

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MAXIMILIAN FUR CO., INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1979	:	
through November 30, 1982.	:	

Petitioner, Maximilian Fur Co., Inc., 20 West 57th Street, New York, New York 10019, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1979 through November 30, 1982 (File No. 801479).

A hearing was commenced before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on October 26, 1987 at 1:15 P.M., and continued to conclusion at the same location on December 8, 1987 at 1:15 P.M., with all briefs filed by June 17, 1988. Petitioner appeared by McGuire & Tiernan (Terri E. Simon, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether certain of petitioner's sales of furs to persons leaving the United States were taxable under Articles 28 and 29 of the New York Tax Law.

II. Whether the Division of Taxation is equitably estopped from imposing sales tax on the aforementioned sales of furs to persons leaving the United States since the Division exempted similar sales in a prior audit.

III. Whether imposition of sales tax on said sales of furs to persons leaving the United States is unconstitutional as violative of either the Import/Export Clause or the Commerce Clause of the United States Constitution.

FINDINGS OF FACT

Petitioner, Maximilian Fur Co., Inc. ("Maximilian"), is a manufacturer and retailer of luxury fur garments, serving an international clientele from its showroom located at 20 West 57th Street in New York City.

On September 23, 1982, the Division of Taxation ("Division") began a field audit of Maximilian which involved a thorough review of the books and records of the business. Said review indicated that the records available for audit were both adequate and sufficient to warrant an audit method that would utilize all the records within the audit period using a

statistical sampling of records. On October 19, 1982, the Division and Maximilian agreed to such a statistical sampling in auditing the sales, recurring expense purchases and fixed asset acquisitions of Maximilian. Petitioner's controller, J.D. Perera, signed the agreement.

The test period selected for the statistical sampling was the quarter ending February 29, 1980. The test performed resulted in additional tax on disallowed nontaxable out-of-state sales reported of \$207,048.12.

A detailed review was made of sales allegedly delivered to airlines but without what the Division deemed acceptable proof of shipment. These sales were denied exemption and yielded an additional \$492,000.00 in taxable sales.

An audit of expense purchases tested for the quarter ended November 30, 1981 and fixed assets for the entire audit period indicated that proper taxes had been paid thereon and no additional taxes were assessed. Therefore, total additional taxable sales were \$699,048.12, which yielded an additional tax due of \$56,416.98.

Consents extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law were executed by the parties, permitting the Division to assess additional sales and use taxes for the period December 1, 1979 through February 28, 1981, at anytime on or before June 20, 1984.

On June 20, 1984, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Maximilian Fur Co., Inc. for the period December 1, 1979 through November 30, 1982, setting forth a total tax due of \$56,416.98 and interest of \$20,202.80, for a total amount due of \$76,619.78.

At a conference held on July 15, 1985, it was determined that the tax assessed on disallowed out-of-state sales was incorrect in that there was proper substantiation for most of said sales. As a result, the tax due on out-of-state sales was decreased from \$16,810.48 to \$316.41, which amount was agreed to by Maximilian. A partial withdrawal of petition was executed by Maximilian with regard to this amount. Therefore, the only issue before this forum is that of disallowed exempt sales of furs to persons leaving the United States. The amount of tax remaining in issue on these disallowed sales is \$39,606.50 plus interest.

The sales in issue, also referred to as "export" or "airline" sales, were sales of fur garments to customers who were about to depart from the United States and who wished to avoid paying New York State sales tax.¹

In order to achieve this end, Maximilian devised a procedure for packaging and sending its furs to Kennedy International Airport or LaGuardia Airport in the Borough of Queens, State of New York.

Maximilian packaged the fur garment in a carton which was then wrapped and sealed. An envelope was attached to the sealed carton containing what is referred to as an "export certificate" in addition to a return envelope, with the return address being that of Maximilian Fur Co., Inc. in New York City. The "export certificate" was prepared on a form of unknown origin which had been used by petitioner at least since 1975.

The "export certificate" was prepared by a storage and shipping employee of Maximilian,

¹There are three sales included which do not fall into this category and they are addressed below.

setting forth the passenger's name, airline, flight number, departure date and time and a description of the merchandise. The form called for the signature of both an airline employee and the Maximilian customer. The airline employee, as stated on the certificate, certified that, on the specified date and indicated aircraft, the named passenger:

"showed me a sealed package which had been carried aboard the aircraft by common carrier and/or other delivery service. (Description of package)

CARTON

marked as follows: (Retailer's name and other markings, if any)

From:
Maximilian Fur Co., Inc.
20 West 57th Street
New York, New York 10019

For: [Name of Passenger, airline,
date and time of departure]

and that the wrappings of said package were undisturbed and sealed in

was the imprint MAXIM:
that said passenger broke the seal(s) and opened the said package in my presence and outside the territorial limits of the United States of America: that said package contained a Sales slip (invoice number, if any) _____
purporting to be from Maximilian Fur Company, Inc. and describing the contents of said package as

[Description of contents]

and that said package contained an article(s) which appeared to be that (those) described on said sales slip(s).

NAME [of airline employee]

SIGNATURE

TITLE"

After the airline employee signed this certification, the passenger signed his name or her name below the following certification:

"I hereby certify that I am the passenger named above, that I purchased the above described article(s) from Maximilian Fur Company, Inc., which article(s) was (were) wrapped and sealed in the above described package by vendor before delivery to me; that I opened said package for the first time as aforesaid outside the territorial limits of the United States of America, and that said article(s) has (have) not been used within the United States of America."

Maximilian instructed its customers to mail this form back to it from their foreign destinations in the envelope provided for that purpose. Petitioner retained all "export certificates" returned to it.

During the audit period, there were 42 purported out-of-state sales which were

disallowed by the Division. For eight of those sales, no "export certificates" were provided either to the auditor, conferee, or at hearing. Those sales, were as follows:

<u>Date</u>	<u>Customer</u>	<u>Petitioner's Exhibit No.</u>
11/6/80	Mrs. Szporn	14
2/16/81	Mrs. M. Ulloa	24
2/27/81	Mrs. S. Cohn	25
12/19/81	Mrs. Schmidheiny	34
10/17/82	Mrs. Mary Nathaniel	37
12/17/82	Mrs. Edith Rosenkrantz	38
11/6/82	Mr. Alberto Benhayon	39
11/30/82	Mrs. G. Sherover	42

Other significant evidentiary material submitted in support of the 42 out-of-state "export" sales were delivery receipts from AM Delivery, which at some time during the audit period became known as Fleet Messenger Service. Each of these delivery receipts indicated from whom the package was picked up, in all instances Maximilian, and to whom the package was to be delivered, which in each case was the customer at his or her respective airline at John F. Kennedy International Airport or LaGuardia Airport. No delivery receipts were entered into evidence for 17 of the 42 purported out-of-state sales. Those sales were as follows:

<u>Date</u>	<u>Customer</u>	<u>Delivery to</u>	<u>Petitioner's Exhibit No.</u>
12/20/79	Mrs. Nelia DeBarletta	British Airways Flight No. 170 (J.F.K. to London)	1
12/23/79	Mrs. Susan Lloyd	American Airlines Flight No. 45 (J.F.K. to Nassau)	2
4/30/80	Mrs. R.D. Wasserman	British Airways Flight No. 170 (J.F.K. to London)	3
1/5/80	Mrs. Marilyn Cohen	South African Airways Flight No. 208 (J.F.K. to Johannesburg)	4
2/2/80	Veronica Neuding	Swiss Air Flight No. 101 (J.F.K. to Zurich)	5
3/25/80	Dr. Cernelutti	Swiss Air Flight No. 101 (J.F.K. to London)	7
3/28/80	Teresa Degens	Export	8
7/3/80	Mrs. M. D'Onofrio	National Flight No. 421 (LaGuardia to Miami)	11

2/16/87	Mrs. M. Ulloa	Peruvian Consul General New York	24
2/27/81	Mrs. S. Cohn	Pan Am Flight No. 201 (J.F.K. to Rio de Janero)	25
11/16/81	Mrs. Carmen Garcia	Eastern Flight No. 901 (J.F.K. to Mexico City)	32
11/27/81	Mrs. M. Quinton	Pan Am Flight No. 104 (J.F.K. to London)	33
11/24/81	Mrs. L. Goulandris	BOAC Flight No. 194 (J.F.K. to London)	35
3/20/82	Mrs. A.G. Kaufman	Swiss Air Flight No. 111 (J.F.K. to Geneva)	36
11/4/82	Mrs. Astrid Carrizosa	Pan Am Flight No. 115 (J.F.K. to Miami)	40
11/24/82	Mrs. G. Caminer	Pan Am Flight No. 2 (J.F.K. to London)	41
11/30/82	Mrs. G. Sherover	_____	42

Most of the 25 delivery receipts entered into evidence were unsigned.

The customer receipts issued to Maximilian by the delivery service, which indicated receipt of the package by the delivery service and also the person and place to whom and to which the package was to be delivered, sometimes contained personal notations of the messenger. For instance, in the case of Mrs. Szporn of Sao Paulo, Brazil, the delivery receipt, F98397 (petitioner's Exhibit 14 in evidence), indicates that the messenger waited two hours at John F. Kennedy Airport between the hours of 6:00 P.M. and 8:00 P.M. on November 6, 1980.

With regard to the sale to Mrs. Edith Resenkrantz (petitioner's Exhibit 38 in evidence), the delivery receipt indicated that the delivery person waited between 11:45 A.M. and 12:11 P.M.

In the case of Mr. Alberto Benhayon (petitioner's Exhibit 39 in evidence), the delivery person waited an hour and a half to find the passenger and Mr. Benhayon signed for the package himself.

In the case of Mrs. M. Ulloa of Lima, Peru, there is no evidence that delivery was even intended to take place at the airport, for the Peruvian Consul General in New York is indicated as the shipping destination on the purchase agreement. Sales tax was not paid because Mrs. Ulloa submitted to Maximilian a note from the Consul General of the Peruvian Consulate,

Carlos Vizquerra, stating that one Dr. Manuel Ulloa-Elias was the Prime Minister and Minister of Economy, Finance and Commerce of Peru and the holder of a diplomatic passport, and was visiting New York City in transit to Lima, Peru at the time of the sale of the coat to Mrs. Ulloa. This sale is denoted in the record as petitioner's Exhibit 24.

Additionally, there were two other sales which were admittedly not airport delivery sales and which were presumably sales for export. However, the first one of these, made on March 28, 1980, to one Teresa Degens denoted in the record as petitioner's Exhibit 8, shows no evidence of mailing or other delivery.

The other sale, made on November 30, 1982 to one Mrs. G. Sherover, denoted in the record as petitioner's Exhibit 42, is also without evidence of mailing or other delivery except for a credit slip which has the phrase "shipped out of state" written on its face.

A prior audit for the period December 1, 1975 through November 30, 1978, found this same petitioner liable for sales and use tax in the sum of \$29,472.59. A conference with regard to this audit period was held on October 7, 1980 before a Tax Department conferee, Robert Pilatzke. The taxpayer, petitioner herein, was represented by its attorney, Philip Maley, and its accountant, Robert Bronsteen.

At the hearing held in the instant action, Mr. Bronsteen appeared and testified that the same issue with regard to deliveries to airlines occurred in the prior case. In the prior audit, five of nine airport sales were found to be nontaxable due to the fact that the taxpayer was able to produce satisfactory proof of out-of-state shipment. The conferee indicated that he reviewed additional export documentation with regard to said sales and reduced the additional tax due accordingly. In his report, conferee Robert Pilatzke stated:

"(2) The export documentation were [sic] reviewed and the additional tax due on sales was reduced to \$5,418.82."

On the same day as the conference, Mr. Bronsteen sent a letter to Mr. Lewis Wheeler of Maximilian Fur Co., Inc. stating the following:

"Please review the enclosed as a guide to our future responsibilities as far as sales tax is concerned.

Signed receipts by airline personnel on Maximilian's current airport delivery forms will be required to exempt the sales from tax." (Emphasis in original.)

Mr. Bronsteen's memorandum with regard to the conferee's preliminary finding on the sales tax audit for the period December 1, 1975 through November 30, 1978 stated, in part, as follows:

"Auditor had disallowed 9 sales in test period totalling \$54,950. Of these sales, six represented deliveries at JFK Airport; two were picked up by a Ford company plane; one was delivered by Maximilian truck to Pennsylvania. Of the 6 deliveries at JFK Airport, two were signed for by pursers of the airline; one was signed for by an airline hostess; one was signed for by an airline stewardess; two were not signed by airline personnel. Maximilian's standard form for airport delivery was used in all cases. There was a signed receipt for the delivery to Pennsylvania.

Preliminary Finding by Conferee

The four sales delivered to JFK and signed for by airline personnel are not subject to sales tax. The sale delivered by company truck to Pennsylvania and signed for is

not subject to sales tax. The two deliveries at JFK which were not signed for and the two sales picked up by the Ford plane are taxable."

Mr. Bronsteen testified at hearing that the same export documentation presented to Mr. Pilatzke was presented herein.

SUMMARY OF PETITIONER'S POSITION

Petitioner argues that it has supplied evidence of export sales outside of the territorial limits of the United States and that therefore said sales were not subject to New York State sales tax.

In the alternative, petitioner argues that the State is equitably estopped from asserting that the sales are subject to New York State sales tax because Maximilian relied upon a prior determination on the same issue wherein purportedly similar documentation was entered and relied upon by the Division in exempting said sales.

Finally, petitioner argues that the imposition of New York State sales tax upon export transactions like the ones in this case is unconstitutional because the merchandise had already entered the export stream, thereby becoming exempt from State taxation under the Import/Export Clause and the Commerce Clause of the United States Constitution.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a tax on the receipts from every retail sale of tangible personal property, except as otherwise provided in Article 28. Further, 20 NYCRR 525.2(a)(3) provides that:

"The sales tax is a 'destination tax,' that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate."

B. Petitioner herein makes many allegations that the Division of Taxation did not do its part in investigating the out-of-state sales by petitioner. However, Tax Law § 1132(c) clearly states that all receipts for property or services of any type mentioned in Tax Law § 1105(a), (b), (c) and (d) are subject to tax until the contrary is established and that the burden of proving that any receipt is not taxable is upon the person required to collect the tax.

In the instant case, petitioner has not carried its burden of establishing that the property sold to Maximilian's customers was delivered anywhere but in the State of New York. It is true that petitioner entrusted its merchandise to an independent courier service for delivery to either Kennedy or LaGuardia Airports in New York City, but it was unable to establish to whom that delivery service delivered the merchandise. There was no testimony from the delivery service or documentation evidencing to whom the deliveries were made. In fact, several of the receipts indicated or inferred that the merchandise was delivered to the passengers at the airports. (See Finding of Fact "10".) The delivery receipt for the sale to Mrs. Szporn of Sao Paulo, Brazil indicates that the messenger waited for two hours at the airport on November 6, 1980. If the messenger was merely dropping off the package at the airport there would have been no need to wait for two hours. Likewise, the sale to Mrs. Rosenkrantz indicated that the messenger waited in that instance for almost a half hour, again raising the inference that the package was not being dropped off at the airline but awaiting the arrival of the passenger.

Further, the "export certificates" do not prove that the merchandise was delivered to the customers beyond the territorial limits of the State of New York. The statement on the certificates allegedly made by airline employees states that a sealed package was carried aboard the aircraft by a common carrier. No evidence of such delivery was ever produced. Further, the only other allegation made by the airline employee on the form was that the package was shown to the airline employee aboard the plane, that the package came from petitioner, that it was opened up before him outside of the territorial limits of the United States and that inside was both merchandise and a sales slip from petitioner which described the contents of the package. The passenger's certification only states that he or she purchased the article from petitioner, that the article was wrapped and sealed in a carton and that the carton was opened for the first time outside of the territorial limits of the United States and not used within the United States. However, neither of these statements rebut the presumption that the passengers/customers took possession of the goods while in the State of New York and therefore all sales reported to be delivered to airlines are taxable within the meaning and intent of Tax Law § 1105(a) and the regulation at 20 NYCRR 525.2(a)(3).

C. This situation differs from a transaction where delivery of an item is made to an airline ticket counter and the customer does not take possession of said item until arriving at his or her destination. In such a case, there is no tax imposed because the petitioner takes possession outside of New York State (Matter of M & B Appliances, Inc., State Tax Commission, April 25, 1984). Since petitioner did not carry its burden of showing where possession of the merchandise was taken by its customers, it must be inferred that possession was taken within the State of New York and that such sales were properly held subject to sales tax (Matter of David Hazan, Inc. v. Tax Appeals Tribunal, ___ AD2d ___ [July 6, 1989]; Matter of Continental Arms Corporation v. State Tax Commission, 130 AD2d 929, revd on other grounds 72 NY2d 976; Matter of Jacques Francais Rare Violins, State Tax Commission, October 5, 1984).

D. The one sale of a natural sable jacket for the sum of \$35,000.00 to Mrs. M. Ulloa of Lima, Peru, petitioner's Exhibit 24, was not a proper sale to a foreign embassy, consular official, employee, or other member of a diplomatic corps. Attached to the receipt for said sale is a memorandum addressed "To whom it may concern", purportedly signed by Carlos Vizquerra, Ambassador and Consul General of Peru, which certified that Dr. Manuel Ulloa-Elias was the holder of a diplomatic passport and was visiting New York City in transit to Lima, Peru at the time of the sale.

Although there were no regulations in effect at the time of this sale, Division audit guidelines published in the Sales and Use Tax Field Audit Manual at section 110.5(C)(2)(c) stated:

"Diplomatic and Consular Exemption for certain individuals. Those individuals who are exempt from tax must have obtained an Identification Card for Diplomatic and Consular Tax Exemption (DTF-10) from the Department of Taxation and Finance for themselves and their spouse. The card bears the name and signature of the individual, official title, address, country represented and exemption number. This card permits the exempt individual to issue a Certificate of Diplomatic and Consular Tax Exemption (ST-126) which should be retained by the vendor."

Clearly, Maximilian should have known, as a properly licensed vendor, that it was duty bound to require such documentation for sales to diplomatic and consular individuals. Its failure to require such identification and keep the Certificate of Diplomatic and Consular Tax Exemption on file is fatal to its claim for exemption from tax. (See Tax Law § 1132[c].)

E. Petitioner asserts that it had relied to its detriment on the October 7, 1980 conference

concerning the prior audit. Petitioner continued the same practice it used during the prior audit period believing that it would not be taxed on its sales to customers leaving the country. Therefore, it contends that the Division should be estopped from asserting tax on those sales now.

As a general proposition, the doctrine of estoppel is not applicable to governmental acts absent the showing of exceptional facts which require its application to avoid a manifest injustice (Matter of Shepard-Pollack, Inc. v. Tully, 64 AD2d 296, 298; Matter of Harry's Exxon Service Station, Tax Appeals Tribunal, December 6, 1988). With reference to tax matters, the doctrine of estoppel is most succinctly stated in the case of Schuster v. Commissioner (312 F2d 311 [9th Cir 1962]). Therein, the court stated:

"It is conceivable that a person might sustain such a profound and unconscionable injury in reliance on the commissioner's action as to require, in accordance with any sense of justice and fair play, that the commissioner not be allowed to inflict the injury. It is to be emphasized that such situations must necessarily be rare, for the policy in favor of an efficient collection of the public revenue outweighs the policy of the estoppel doctrine in its usual and customary contacts." (Id. at 317.)

Although the circumstances of the prior audit period and the instant audit period appear substantially similar, it is not known with absolute certainty on what grounds the "exempt sales" in the prior audit period were allowed by the conferee. The conferee's report, which can at best be described as skeletal, does not state that the "exempt certificates" were adequate proof of the exempt sales, despite the testimony of Mr. Robert Bronsteen, C.P.A., that the same evidence of exempt sales was produced at the prior audit period's conference and was accepted by the conferee as adequate proof of an export sale. Further, it is not clear what Mr. Bronsteen meant in his letter to Maximilian by "signed receipts" from airline personnel. None of the delivery receipts were signed by airline personnel in the instant case. And, if the reference in his letter was to the "export certificates" he was mistaken in calling them delivery receipts because the airlines never signed or took responsibility for the passengers' furs.

The sales to customers departing on airline flights from New York area airports were delivered in New York and therefore were subject to sales tax. That such sales are subject to sales tax is supported by the law and regulations and such a conclusion was supportable in the prior audit period as well as in the instant case. Moreover, even if the Division erred in the past, no useful purpose would be served by compelling the Division to repeat its mistake for the sake of consistency (Matter of Fox v. Board of Regents of the State of New York, 140 AD2d 771). For it has been held that an administrative body, like a court, may correct its erroneous interpretations of the law. (See, Matter of Leap v. Levitt, 57 AD2d 1021.)

It is not conceivable, given the evidence adduced in this case, that petitioner did not realize that its deliveries were being made in the State of New York. Particularly pertinent are the delivery receipts which indicate the delivery persons waiting for passengers for upwards of two hours at the airports and the instance where the passenger himself signed for the merchandise from Maximilian.

For all of the above-stated reasons, it is held that the Division is not estopped from imposing sales tax on the purported "export" sales.

F. Finally, petitioner contends that sales tax on these purported export sales is unconstitutional because it violates the Import/Export Clause and/or the Commerce Clause of the United States Constitution. However, the imposition of a sales tax on receipts from petitioner's in-state sale of furs to customers leaving the State, is not unconstitutional (Matter of David Hazan, Inc. v. Tax Appeals Tribunal, supra). Petitioner has not sustained its burden of

proof with regard to delivery of the furs out of the State of New York and therefore the deliveries are presumed to have occurred in the State. (Id.) The sales tax imposed on receipts from all in-state sales of tangible personal property is not a duty or impost being levied on exports (Department of Revenue of the State of Washington v. Association of Washington's Stevedoring Companies, 435 US 734, 760 [1978]). No tariff on export goods has been created by imposition of the sales tax on receipts from furs sold by petitioner. Petitioner is simply being assessed the same tax assessed on all New York taxpayers on receipts from sales of tangible personal property delivered in New York State.

G. Section 307(1) of the New York State Administrative Procedure Act requires a ruling upon each proposed finding of fact submitted by a party to the proceedings. Petitioner submitted such proposed findings of fact which substantially have been incorporated herein, except for numbers 3, 7, 16, 17 and 18 which are deemed to be irrelevant and immaterial, numbers 6 and 11 which are deemed to be irrelevant, immaterial and conclusory, and numbers 9, 14 and 15 which are deemed to be conclusory in nature.

H. The petition of Maximilian Fur Co., Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, as modified at conference (see, Finding of Fact "6"), dated June 20, 1984, is sustained together with such interest as may be lawfully owing.

DATED: Troy, New York
August 10, 1989

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE